

Order 97-12-10



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Served: December 5, 1997

Issued by the Department of Transportation
on the 5th the day of December, 1997

Application of

CONTINENTAL AIRLINES, INC.

for an exemption pursuant to 49 U.S.C.
Section 40109 (San Antonio-Mexico City)

Docket OST-97-2845

Joint Application of

UNITED AIR LINES, INC.

and

**COMPANIA MEXICANA de AVIACION,
S.A. de C.V.**

under 49 U.S.C. 40109 for exemptions
(U.S.-Mexico) and route integration; and for
statements of authorization under 14 CFR
Parts 207 and 212 (reciprocal code-sharing
services)

Docket OST-96-1988

FINAL ORDER

Summary

By this order we make final our tentative decisions in Order 97-11-26 to (1) withdraw the designation and related regulatory authorities for United Air Lines, Inc. (United), to provide scheduled combination services in the San Antonio-Mexico City market pursuant to a code-share arrangement with Compania Mexicana de Aviacion, S.A. de C.V. (Mexicana); and (2) grant exemption authority and designate Continental Airlines, Inc. (Continental), to provide foreign scheduled air transportation services in the San Antonio-Mexico City market with its own aircraft.

Background

By Order 97-11-26 we proposed to replace the San Antonio-Mexico City code-share services currently operated by United under its code-share arrangement with Mexicana (*i.e.*, withdraw United's designation and terminate the underlying economic authorities) with the nonstop daily roundtrip services proposed by Continental to be operated with its own aircraft. We proposed to take this step in pursuit of announced policies for insuring the most effective use of our limited opportunities with Mexico. See Order 97-9-38. Objections to our tentative decision were due November 20 and answers to objections were due November 25.

Responsive Pleadings

United filed an objection to the Department's tentative decision and Continental filed an answer.

United objects to the Department's tentative decision only to the extent that it proposes to terminate the underlying economic authorities for the United/Mexicana code-share services in the San Antonio-Mexico City market. United further states that it does not oppose approval of Continental's exemption application and withdrawal of United's designation for the service, provided that Continental's authority is conditioned upon (1) Continental operating services with its own aircraft, and (2) the designation reverting automatically to United should Continental terminate San Antonio-Mexico City services with its own aircraft.

United contends that it is unnecessary to terminate the underlying economic authorities for its code-share services with Mexicana since the required designation to operate the services would be withdrawn, and since it may become possible for United and Mexicana to restore their code-share services should the U.S. and Mexico reach an agreement on code-share services or one of two designated carriers discontinues operations with its own aircraft. In this regard, United notes forthcoming informal consultations with Mexico on code-share issues and the Department's statements in Order 97-11-26 that it is continuing to seek a third designation for the San Antonio-Mexico City market. United argues that the retention by United and Mexicana of their underlying economic authorities and the conditions on Continental's exemption award would ensure that their services could be restored immediately should an intergovernmental

agreement on code-share services be reached, or Continental cease services with its own aircraft in the San Antonio-Mexico City market.

Continental urges the Department to issue a final order immediately confirming its decision to grant Continental's exemption application and to designate it for services in the San Antonio-Mexico City market. Continental further states that it does not object, on an interim basis, to the conditions proposed by United. Continental expresses concern, however, that unlimited backup authority for a code-share operation could be directly contrary to the Department's policy to favor direct carrier services over code-share services. Continental notes that should it cease its own-aircraft service in the market, under the proposed condition, United would have priority over another airline that sought to operate its own flights in the market. Continental urges the Department to consider the issue of backup designations for code-share services in connection with a broader review of dormancy issues in the U.S.-Mexico market, rather than in this proceeding.

Decision

We have decided to make final our tentative decisions in Order 97-11-26. Specifically, we will (1) withdraw the designation and related regulatory authorities for United to provide scheduled foreign air transportation services of persons, property, and mail in the San Antonio-Mexico City market pursuant to a code-share arrangement with Mexicana; and (2) grant exemption authority and designate Continental to provide foreign scheduled air transportation services of persons, property, and mail in the San Antonio-Mexico City market with its own aircraft (direct carrier services). Continental's exemption authority will be effective immediately for a period of two years, and will be subject to the condition that it will remain effective only if Continental continues to serve the market with its own aircraft. It also will be subject to our standard 90-day dormancy notice condition.

In Order 97-11-26, we tentatively concluded that, consistent with our stated policy favoring services by U.S. carriers with their own aircraft in the limited U.S.-Mexico markets, replacement of United's code-share services with Continental's direct carrier services in the San Antonio-Mexico City market was in the public interest.¹ No party has opposed that finding, and, therefore, we will make final our decision to grant Continental's exemption application.

We will subject the authority to the condition that it will remain effective only so long as Continental continues to serve the market with its own aircraft. The purpose of our direct services policy set forth in Order 97-9-38 is to ensure maximum use of the limited route rights available under our agreement with Mexico. Should Continental change the manner in which it serves the market, the basis for our award in this case would be undermined and we would need to reexamine how the San Antonio-Mexico City route opportunity should be used. In these circumstances, we believe that the additional condition, which is not opposed by Continental, is in the public interest.

¹ Based on data officially noticeable under rule 24(n) of the Department's regulations, we find that Continental is qualified to provide the proposed San Antonio-Mexico City services. See, Order 97-3-24.

While we appreciate United's desire to restore its code-share services in the market, we are not persuaded that the backup condition it has proposed or its request to retain the regulatory authorities for its San Antonio-Mexico City code-share services are warranted here.

Because the U.S.-Mexico market is limited-entry in nature, we have consistently applied certain dormancy conditions to all U.S.-Mexico route authority to provide for prompt replacement services should a carrier discontinue services in a given city-pair market. Thus, it has not been our policy to permit carriers to hold dormant authority, such as United seeks here. Consistent with this policy, the authority awarded Continental in this case will be subject to the standard dormancy notice condition. Should either of the two designations become available (Continental's or American's), we will be prepared immediately to proceed with requests of other interested U.S. carriers, including United, to serve the market. Similarly, should a third designation become available, and our efforts are continuing in this regard, we are prepared to act immediately to ensure that the new rights can be implemented. Against this background, and given our ability to act quickly to authorize services in available U.S.-Mexico markets, we are not persuaded that retention of the United/Mexicana regulatory authorities or the automatic backup condition proposed by United is warranted or consistent with the public interest.

Finally, we note that as a result of our decision here there will be a transition of carriers serving the San Antonio-Mexico City market. We will require that United and Continental work cooperatively to facilitate an orderly transition of services.²

ACCORDINGLY,

1. We withdraw the designation of United Air Lines, Inc., and the underlying regulatory authorities granted to United Air Lines, Inc. and Compania Mexicana de Aviacion, to engage in code-share services in the San Antonio, Texas-Mexico City, Mexico, market;
2. We grant Continental Airlines, Inc., an exemption under 49 U.S.C. § 40109 to provide scheduled foreign air transportation of persons, property, and mail between San Antonio, Texas, and Mexico City, Mexico, for a period of two years from the date of service of this order;³
3. The authority granted in ordering paragraph 2, above, is subject to (1) the dormancy notice requirements set forth in condition (7) of Appendix A of Order 88-10-2; and (2) the condition that the authority remains in effect only so long as Continental continues to serve the market with its own aircraft;

² In this regard, we note that United's comments indicate that United has already sold San Antonio-Mexico City tickets beyond December 18, the date on which Continental seeks to commence its services in the market, and expects that Mexicana will honor those tickets as they were sold prior to withdrawal of United's designation to serve the market. United also states that it will discontinue the sale of code-share tickets upon issuance of a final order in this case.

³ We find that because our action will not result in a near term increase in annual fuel consumption of 10 million gallons, it does not constitute a "major Federal action" under the Energy Policy and Conservation Act of 1975.

4. To the extent not granted, we deny all other requests filed in conjunction with the application of Continental Airlines, Inc. in Docket OST-97-2845; and

5. We will serve this order on Continental Airlines, Inc.; United Air Lines, Inc.; Compania Mexican de Aviacion, S.A. de C.V.; the United States Department of State (Office of Aviation Negotiations), and the Federal Aviation Administration (AFS-200).

By:

PATRICK V. MURPHY
Deputy Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this order is available on the World Wide Web at
<http://dms.dot.gov/general/orders/aviation.html>.*